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82-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNDERWRITERS AT LLOYD'S,

Petitioners,

—against—

OPE SHIPPING, LTD., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Summary of Argument

Respondents, OPE SHIPPING, LTD., VADOR SHIPPING, LTD., DURAS SHIPPING, LTD. and AGUA SHIPPING, LTD., respectfully pray that the petition of UNDERWRITERS AT LLOYD'S ("WAR RISK INSURERS") for writ of certiorari to the United States Court of Appeals for the Second Circuit be denied.

The decision below was completely in accord with the applicable law and the petition shows no special or important reasons why the writ should issue. The WAR RISK INSURERS do not show that the court of appeals decision breaks any new ground, raises any questions of constitutional, treaty or statutory interpretation, or that it is in conflict with the law as defined by his Court or by any other forum.

Statement of Facts

This case began as four separate actions which were commenced by private corporations to recover damages under policies of marine and war risk insurance for the loss of four commercial ocean going vessels (the HOPE, the EL SALVADOR, the MANAGUA and the HONDURAS) each having an agreed insured value of $1,000,000.00. The underlying facts are succinctly stated in the court of appeals decision [*App. A, pp. A2-A5*].*

> In June, 1979, the *El Salvador*, the *Hope*, the *Managua* and the *Honduras* were owned respectively by three Panamanian corporations and one Nicaraguan corporation, all apparently under the control of General Anastasio Somoza. The ships were registered under the Nicaraguan

*References in this brief to "App." are to the indicated appendices found at the end of the petition for certiorari.

flag. The four vessels were lost to their owners during the 1979 Nicaraguan revolution which resulted in the overthrow of the Somoza government by Sandinista forces. The chronology of events leading to the demise of the Somoza regime is set forth in the opinion of the court below, reported in 521 F. Supp. at 342.

On June 17, 1979, the *Hope* was taken over by four armed crew members who identified themselves as Sandinistas and ordered the ship's captain to proceed to Cuba. In Puerto Nuevita, Cuba, Cuban authorities came aboard the *Hope* and sailed it to Mariel, Cuba, where it remained until it was returned to Nicaragua.

On June 22, the *El Salvador* was removed from the Canal Zone to Panamanian waters while its captain was ashore. The chief mate stated that five armed crew members, who identified themselves as Sandinistas, ordered the transfer and hoisted the Sandinista flag. The Panamanian Maritime National Guard took control of the ship. The *Honduras* and the *Managua* suffered similar fates around June 22. The *Honduras* was taken from the Canal Zone into Panamanian waters, while the *Managua* slipped out of El Salvador in contravention of orders and also was taken to Panama.

On June 24 and 28, 1979, Somoza informed his longtime business associate Joseph Baittiner about the fate of the ships. At Somoza's request, Baittiner then undertook to transfer title of the ships to Cayman Islands corporations. On July 9, papers were executed for the transfer of the *Hope* from El Porvenir Shipping Co., Inc. to OPE Shipping, Ltd., the *El Salvador* from Cia. de Navegacion La Libertad, S.A., to Vador Shipping, Ltd., the *Honduras* from Marina Mercante Nicaraguense, S.A. to Duras Shipping, Ltd. and the *Managua* from Cia. de Navegacion Corinto, S.A. to Agua Shipping, Ltd.

On or before July 10, the marine risk coverage on the ships was cancelled, either for non-payment of premiums

or because of the change in ownership. On July 11, the war risk insurers authorized the assignment of their policy to the Cayman Islands corporations. On July 13, the vessels were registered under the British flag in the Cayman Islands.

The ships remained in Cuba and Panama until after the Sandinistas gained complete control of the Nicaraguan government. The vessels were returned to Nicaragua in August, 1979, and on September 28, 1979, plaintiffs sued in the court below to recover their insured value.

In the summer of 1980, the Empresa Nacional de Puertos, an agency of the Sandinista government, commenced actions in the First District Court of Managua, Nicaragua, to recover port charges for the four ships which had accrued while they were laid up in Corinto, Nicaragua. The ships were attached pursuant to judicial orders, and, following the entry of judgments, were offered for sale at public auction and purchased by Empresa for the amount of the charges owed.

* * *

At the time the ships were diverted from their courses, the marine risk insurance was in effect. The marine policy covered loss due to barratry of the master and mariners and other like perils, but specifically excluded loss resulting from civil war, revolution, rebellion, insurrection or civil strife arising therefrom, hostilities or warlike operations, whether or not there was a declaration of war.

* * *

[A] war risk policy complemented the marine risk policy by providing coverage for the risks excluded from coverage in the latter policy under the "War, Strike and Related Exclusions" clause.

The court of appeals affirmed the district court's dismissal of the complaints against the MARINE RISK INSURERS, but reversed the dismissal of the complaints against the WAR RISK

INSURERS. In doing so, it rejected, for sound reasons, the arguments now advanced by the WAR RISK INSURERS that they should be relieved of liability because the war risk policy excluded coverage for losses due to "[c]apture, seizure, arrest, restraint, detainment, or confiscation by the Government . . . of the country in which the Vessel[s were] owned or registered." *Id.*

The WAR RISK INSURERS have chosen to treat this lawsuit as one between themselves and General Somoza. However, the contracts of insurance did not insure General Somoza or the government he headed. The lawsuit only involved contracts of marine and war risk insurance which were duly negotiated and paid for by four private corporations and the four vessels which these corporations owned. The WAR RISK INSURERS were obviously fully aware of the political situation in Nicaragua in 1978 and 1979, but wrote and issued the policies in the form sued upon, and they accepted premiums, not from General Somoza, but from the private corporations.

In this regard, the WAR RISK INSURERS make allegations of fact that simply do not square with the record.

On page 3 of their petition, they say:

> The four vessels were irrevocably lost to their owners as of June 17-22, 1979 because neither Cuba nor Panama would return the vessels because of their connection with Somoza.

Neither the district court nor the court of appeals made any such finding. Both courts found that the vessels were lost because they were taken over by their respective crews and that they were taken to Cuba and Panama for safekeeping. *App. A, pp. A2-A5; App. B, pp. A16-A18, A22-A24.* Neither court made any determination of "irrevocability". As explained in Point II of this brief, whatever events may have occurred *after* the vessels were taken cannot in any event defeat the OWNERS' right to recover under the policy.

The WAR RISK INSURERS also state on page 3 of the petition:

> The Sandinistas took complete control of Nicaragua on July 20, 1979 and, on that same day, expropriated the entire business empire of Somoza

Although the district court decision refers to a NEW YORK TIMES report to that effect [*App. B, p. A15, no. 14*], the court of appeals noted that all that was ever shown was that the Nicaraguan Attorney General was given *authority* to take over, requisition and confiscate all assets of the Somoza family. And that the conduct of the Sandinista Government was inconsistent with any such confiscation of the four vessels. *App. A, p. A8; App. F, p. A34.* There was no evidence as to what assets of the Somoza family the Nicaraguan Attorney General did in fact confiscate or when he confiscated them. *Id.* On the other hand the evidence conclusively established that the Sandinista Government brought suits against the Cayman Island respondents as owners of the vessels for port charges and became owner as the result of purchase of a judicial sale [*App. A, pp. A3, A7-A8*].

ARGUMENT

I.

The Court of Appeals' review was proper.

A. The Clearly Erroneous Rule.

The WAR RISK INSURERS contend that the court of appeals violated the Clearly Erroneous Rule because it overruled or ignored the district court's findings that the transfers of the vessels were shams. *Petition, p. 9.* However, the court of appeals overruled the district court *on the law*, holding that the INSURERS lacked standing to inquire into the transfers. *See, App. A, pp. A6-A7.*

B. Piercing the Corporate Veil.

Citing *Kirno Hill Corp.* v. *Holt*, 618 F. 2d 982, 985 (2d Cir. 1980), the WAR RISK INSURERS contend that the district court's piercing of the corporate veil to place ownership of the vessels in General Somoza, personally, could have been justified on the basis that General Somoza completely dominated the former Panamanian and Nicaraguan corporate vessel owners. This contention is not borne out by the law or by the evidence. The portion of the *Kirno Hill* decision relied upon by the WAR RISK INSURERS and cited on page 10 of their petition states:

> The prerequisites for piercing a corporate veil are as clear in federal maritime law as in shoreside law: [the individual] must have used [the corporation] to perpetrate a fraud or have so dominated and disregarded [the] corporate form that [the corporation] primarily transacted [the individual's] personal business rather than its own corporate business. [Citations omitted].

There was no evidence adduced at trial or mentioned in the district court decision [*App. B, pp. A10-A25*], and none is cited by the WAR RISK INSURERS, to show that the corporate forms of the Panamanian and Nicaraguan companies which formerly owned the vessels were ever "dominated" or "disregarded" by General Somoza, or that he ever used those companies to transact his own personal business.

THE WAR RISK INSURERS go on to argue that piercing the corporate veil could also have been justified on the ground of fraud since the transfers of the vessels occurred after they had been lost so that there was supposedly no title or registry to transfer, and the request by the corporate owners to the WAR RISK INSURERS to endorse the transfer of vessel ownership onto the war risk policy constituted a misrepresentation or concealment of material fact sufficient to constitute a fraud. *Petition, pp. 10-11.* This argument is also unwarranted for several reasons

and is nothing more than a belated attempt to raise an issue which never existed in the case from its very inception.

The WAR RISK INSURERS first attempted to create a question of fraudulent concealment and misrepresentation in their petition for rehearing to the court of appeals. It was not pleaded in their answers as required by Fed.R.Civ.P. 9(b) nor was it raised in the district court or argued to the Second Circuit on appeal. (Neither lower court decision makes any reference to the point. *See, Appendices A and B*).

Second, there appears to be no authority for the proposition that the lawful owner of property can be divested of title by one who wrongfully takes it from him. As explained in Point III below, the one case cited by the WAR RISK INSURERS purportedly in support of their position is in fact authority for precisely the opposite. Even if we were to accept the WAR RISK INSURERS' contention that the vessels were confiscated by the Sandinista government (which they were not), the confiscation decree on which they rely was not issued until eleven days *after* the July 9, 1979 transactions. *See, App. F, p. A34.*

Third, the authorities cited by the court of appeals. [*App. A, p. A6*] show that there must be some causal connection between the use of the corporate form and the fraud alleged to have been perpetrated. The WAR RISK INSURERS do not allege any fraud caused by use of the corporate form.[1]

C. Scope of the Review.

The WAR RISK INSURERS argue that the court of appeals limited its review to confiscation and refused to test the other excepted clauses in the war risk policy (capture, seizure, deten-

[1]To put the matter in proper perspective, one need only imagine how the WAR RISK INSURERS would have reacted had General Somoza brought suit in his own name to recover under the policy issued to a Nicaraguan and three Panamanian corporations.

tion, etc.) against its own findings of fact that the vessels were commandeered, seized and detained. *Petition, pp. 11-12.* The argument simply does not square with the record. The court of appeals *did* consider the other excepted causes and found that both as a matter of law and fact they were *not* the proximate cause of the vessels' loss. *See, App. A, pp. A5-A9.*

II.

This case does not raise any issues of overriding importance to the Marine Insurance Community.

The WAR RISK INSURERS argue that the court of appeals decision directly conflicts with *Standard Oil* v. *United States,* 267 U.S. 76, 45 S.Ct. 211, 69 L.Ed. 519 (1925). The court of appeals decision not only does not conflict with that decision but is in complete accord with it.

Standard Oil arose out of the loss of the SS LLAMA which was boarded at sea by naval officers of a foreign power (Britain) and diverted via Kirkwall for examination. On its way, it struck a rock and was totally lost. The issue addressed by the Supreme Court was whether the loss of the vessel was covered by the marine risk policy which covered perils of the sea such as striking a rock, or by the war risk policy which covered:

> [T]akings at sea, arrest, restraints and detainments of all kings, princes and peoples, of what nation, condition or quality soever, and all consequences of hostilities or war like operations, whether before or after declaration of war.
>
> 267 U.S. at 77.
> 69 L.Ed. at 520.

In holding the war risk insurer liable for the loss, the *Standard Oil* Court held:

> [T]hat the vessel and her cargo were seized, arrested, and detained within the meaning of the [war risk] policy we think too plain to require much more than mention.
>
> 267 U.S. at 78, 69 L.Ed. at 521

and that:

> [I]f a vessel should be taken from an owner's hands without his consent, and should be lost while thus held by a paramount power, obviously a company that had insured against such a taking could not look beyond and attribute the loss to a peril of the sea. *Whatever happens while the taking insured against continues fairly may be attributed to the taking. That is a nonconductor between the insured and subsequent events.* [Emphasis added].
>
> 267 U.S. at 77-78.
> 69 L.Ed. at 520-21.

Allegedly on the *Standard Oil* decision, WAR RISK INSURERS argue that since the SS LLAMA was held to have been seized, arrested and detained within the meaning of the *Standard Oil* perils clause, then the four vessels must also be held to have been seized, arrested and detained within the meaning of their exclusionary clause. However, the two takings were different. The SS LLAMA of *Standard Oil* was taken by naval officers of a foreign power, which falls within the classic definition of capture and seizure. See, Mullins, MARINE INSURANCE DIGEST, pp. 30-31 [Cornell Maritime Press, Cambridge Maryland, 1959]. The four vessels in this case were taken over by their respective crews which both the court of appeals and the district court found fell within the classic definition of barratry. *App. A, pp. A2-A5; App. B, pp. A16-A18, A22.* Neither the district court nor the court of appeals found that the ships were ever detained by Cuba or Panama. The finding of the district court, which was not disturbed by the court of appeals, was that the ships were delivered to Panama and Cuba by their crews for "safekeeping". *App. B, p. A24.* Thus there not only was no capture, seizure, arrest, re-

straint or detainment, but under *Standard Oil* they could not be the proximate efficient cause of the loss.

Petitioners' attempt under these circumstances to construe *Standard Oil* into controlling authority in this case, while novel, is unknown to Anglo-American jurisprudence. Merely substituting the name of Sandinistas for the British navy does not bring this case within the exclusionary language of petitioners' War Risk Clauses. In the absence of a change in the factual pattern the proximate efficient cause of the loss in this case still remains the barratrous conduct of the crews in taking over control of the vessels as found below and not capture, seizure, arrest, restraint or detainment which occurred in *Standard Oil* but in fact were not found to have occurred in the case at bar.

What the WAR RISK INSURERS are really doing in their petition is taking ordinary descriptive words from the court of appeals decision out of context and attempting to convert them into findings of excluded events within the meaning of the war risk policy exclusions. A fair reading of the court of appeals decision shows that that court never found that the loss of the vessels was proximately caused by capture, seizure or detainment, etc. within the meaning of the policy or by anything that happened in Cuba or Panama after the vessels had already been lost to their owners. This same observation was made by respondents in an affidavit [*App. G, pp. A35-A36*] submitted to the court of appeals in opposition to the WAR RISK INSURERS' application for leave to file a renewed petition for rehearing. The court of appeals obviously understood the context in which it had used these words and therefore denied the WAR RISK INSURERS' application. WAR RISK INSURERS characterization of respondents' affidavit as an attack on the court of appeals decision is just another example of their attempt to create a case for the purpose of obtaining review on issues which do not exist. for the purpose of obtaining review on issues which do not exist

If the marine insurance community genuinely fears that the language of the exclusionary clause of the war risk policy is

ambiguous, it has only to change that language to precisely reflect the events they wish excluded.

III.

This case does not involve conflicting Government rights.

The WAR RISK INSURERS contend that this case raises a question of conflicting de jure and de facto government rights. That is not so. This case involves nothing more than contractual claims by private corporate vessel owners and their assignees to recover under policies of marine and war risk insurance issued by various underwriters for the loss of four commercial ocean going vessels. The Sandinista Government made no claim to the vessels by virtue of any governmental power or authority by public acts or otherwise. Instead it recognized the private ownership of the vessels and brought proceedings in its own courts to recover port charges and then became owner of the vessels only as the result of purchasing them at a judicial sale.

Thus, it is hard to see how the WAR RISK INSURERS can argue that the court of appeals violated the act of state doctrine. That doctrine simple precludes the courts of this country from inquiring into the validity of public acts of a recognized sovereign power committed within its own territory. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 400, 84 S.Ct. 923, 11 L.Ed. 2d 804, 808 (1964). The court of appeals did not inquire into the validity of any Sandinista governmental confiscation of the vessels. It simply inquired whether any such confiscation ever took place and found that it had not:

> The Sandinista government commenced actions in 1980 against the Cayman Island corporations as owners of the four vessels to recover port charges accrued by the ships

> after they were returned to Nicaragua. Defendants' expert witness, Dr. Ortega, testified that, at the conclusion of those proceedings, the Nicaraguan government "became" the owner of the ships. The bringing of those actions and the sales of the ships to the Sandinista government belie the insurers' assertions that the Nicaraguan government had confiscated the ships in 1979.
>
> *App. A, pp. A7-A8.*

The court of appeals was correct when it noted that the confiscation authorization decree relied upon by the WAR RISK INSURERS [*App. F, p. A34*] merely provides that the Nicaraguan attorney general should *proceed with* the taking over, requisitioning and confiscation of all assets of the *Somoza family*. That decree says nothing more. By its own terms, it does not purport to confiscate anything. It does not identify or refer to any of the vessels or the vessels' corporate owners or assignees. Furthermore there was no evidence at trial, and none is cited by the WAR RISK INSURERS, to indicate that the Sandinista government ever considered the vessels to have been confiscated or that it even considered the vessels to be assets of the Somoza family within the meaning of the decree. In fact, its conduct clearly was the contrary.

The WAR RISK INSURERS also argue that under the rules of international warfare, the Sandinista government *retroactively* became the owner of the ships when, after the confiscation authorization decree [*App. F, p. A34*] had been issued, the ships returned to Nicaragua. *Petition, p. 18.* However, as the Court of Appeals noted, if the Sandinista government had retroactively become the owner of the four vessels, it would hardly have been necessary for it to purchase the ships at a judicial sale which took place one year after the vessels returned to Nicaragua. *App. A, pp. A7-A8.*

It is difficult to understand in what way *Civil Air Transport Incorporated* v. *Central Air Transport Corporation,* (1953) A.C.

70, 2 Lloyds' Reg. 209 (Privy Council) supports the WAR RISK INSURERS or is authority for the district court decision. That case deals with the validity of title passed by a sale of aircraft rather than liability under an insurance policy and it is distinguishable because the owner and transferor of the aircraft was the deposed Nationalist government of China. The ships in this case were *privately* owned,[2] and nothing in the *Civil Transport* decision extends the "accepted rules of international warfare" (*Petition, p. 18*) regarding acquisition of title to state assets to property that is privately owned.

If *Civil Transport* is authority for this case, it does not support WAR RISK INSURERS' position. It held that the sale of the aircraft *did* convey good title and that the doctrine of retroactivity was inapplicable to property, the possession of which was wrongfully obtained. A.C. at 94-95. The Privy Council held that the validity of the sale "must be judged as at the date when it was entered into, and not in the light of subsequent events". A.C. at 91. The sale was not a "device" for "alien and improper purposes" even if its motive was to secure that the aircraft should not fall into Communist hands. A.C. 91-92.

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[2]The position of both the district court and the WAR RISK INSURERS is that the ships were owned by Anastasio Somoza, personally, rather than by any of the corporations. *See, e.g., Petition, pp. 9-11; App. B, pp. A11.* No one has yet claimed that the ships were owned by the government General Somoza headed.

CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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